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Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6587

CLIFFORD HERRING,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

Interest of the Attorney General of the State of New York

This appeal involves the constitutionality under the United States Constitution of a New York State Statute, Criminal Procedure Law, § 320.20(3)(c), which provides that in a non-jury trial "the court may in its discretion permit the parties to deliver summations", which statute was duly enacted by the New York State Legislature.

The Attorney General did not participate in the proceedings in the New York State courts but now seeks to file his brief with this Court on behalf of the sovereign state of New York in his statutory capacity, as a result of his statutory duty "[w]henever the constitutionality of a [New

York State] statute is brought into question • • • it shall be the duty of the attorney general to appear in such action or proceeding in support of the constitutionality of such statute" (New York Executive Law, § 71) which right is recognized by this Court (Rule 42).

Since this appeal involves the constitutionality of a New York State Statute, it is important that the views of the chief legal officer of the State be presented to this Court. In addition the present representation is by the District Attorney of Richmond County whose primary interest is only upholding the judgment of conviction of the state court. The judgment of this Court may well affect a large number of non-jury criminal trials conducted in the State of New York since September 1, 1971, the effective date of the statute, and is therefore of vital interest to the State of New York.

In view of the paramount state interest herein involved leave is requested to file the within brief at this time, beyond the time limits provided in Rule 42.

Question Presented

Does a New York defendant in a criminal non-jury trial have a federally protected constitutional right to sum up to the trial judge prior to the rendition of his verdict, or does the trial judge have discretion to refuse to listen to closing argument without violating any fundamental federal constitutional right of the defendant?

Statement

A. The New York Constitutional and Statutory Scheme

The substantive question on this appeal involves the constitutional validity under the United States Constitution, of the New York constitutional and statutory scheme, which

grants to a criminal defendant an unconditional and unrestricted right, subject to judicial supervision, to waive a jury trial, in all cases, except those in which the crime charged may be punishable by death, and under which waiver the defendant may knowingly lose the right to have his attorney sum up to the court prior to the rendition of the verdict.

The New York State Constitution grants unto the defendant in all cases not involving a crime punishable by death, a constitutional right to waive a jury trial and to be tried by a judge. The provision is found in Article 1, § 2 of the New York State Constitution, which provides in pertinent part:

> "A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver."[1]

Prior to 1971 there were no statutory enactments relating to the waiver of a jury trial or the conduct of non-jury trials in criminal cases, which were governed by the con-

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[1] The complete text of Article 1, § 2 of the New York State Constitution is found in McKinney's Consolidated Laws of New York Annotated and is set forth in Appendix "A", *infra*, at page 18, together with the pertinent provisions of the New York Criminal Procedure Law relating to the waiver of, and the conduct of non-jury trials; § 320.10, Non-jury trial; when authorized (pp. 19-20); § 320.20, Non-jury trial; nature and conduct thereof (pp. 20-21); § 260.30 jury tral; in what order to proceed (p. 22; parts of § 260.30 relating to "[t]he order in which evidence must or may be offered" in a jury trial is incorporated by reference into § 320.20(3)(b), relating to non-jury trials).

stitutional provision and judicial decisions (see *People* v. *Duchin*, 12 N Y 2d 351, 239 N.Y.S. 2d 670, 190 N.E. 2d 17, 1963; *People ex rel. Rohrlich* v. *La Follette*, 20 N Y 2d 297, 282 N.Y.S. 2d 729, 229 N.E. 2d 419, 1967). In 1971 New York enacted a new Criminal Procedure Law, effective September 1, 1971, which for the first time made legislative provision for the waiver of jury trial in criminal cases (CPL § 320.10), and for the conduct of non-jury trials (CPL § 320.20), which implemented the jury waiver provision of the New York Constitution as interpreted by the New York Court of Appeals (see *People ex rel. Rohrlich* v. *La Follette, supra; Denzer*, Practice Commentary to § 320.10 at pp. 603, 604).

CPL § 320.10 provides for the waiver of jury trial in non-capital cases which "must be in writing and must be signed by the defendant in person in open court in the presence of the court, and with the approval of the court. The court must approve the execution and submission of such waiver unless it determines that it is tendered as a stratagem to procure an otherwise impermissible procedural advantage *or that the defendant is not fully aware of the consequences of the choice he is making.*" (CPL § 320.10[2]; Emphasis supplied).

CPL § 320.20 for the first time in New York provides for the nature and conduct of non-jury criminal trials. It provides *inter alia* that "[t]he court in addition to determining all questions of law, is the [exclusive] trier of all issues of fact and must render a verdict" (subparagraph 2). It further provides the "order of the trial" (subparagraph 3), providing that "[t]he court may in its discretion permit the parties to deliver opening addresses (subdivision a); that the "order in which evidence must or may be offered" is the same as provided for jury trials (subdivision b); that "*[t]he court may in its discretion permit the parties to deliver summations*" (subdivision c), which is

sub judice; and that "[t]he court must then consider the case and render a verdict" (subdivision d). Subparagraphs 4 and 5 make all other provisions relating to jury trials "so far as practicable and appropriate" also applicable to a non-jury trial.

B. The Defendant's Waiver of Trial by Jury

On January 28, 1972, the defendant, together with his attorney, appeared before the trial court and advised Justice Barlow, who eventually conducted the trial, that the defendant desired to have his case tried by a judge, without a jury.[2]

Pursuant to Article 1, § 2 of the New York State Constitution and § 320.10 of the New York Criminal Procedure Law, Justice Barlow conducted a hearing to determine that "the defendant [was] fully aware of the consequences of the choice he is making" and precisely what rights the defendant was giving up (CPL § 320.10[2]).

The following colloquy between Justice Barlow and the defendant occurred during such Waiver of Jury Trial Hearing [Appendix "B", *infra*, pp. 23-25].

> "The Court: Now, Mr. Herring, [the defendant] it is my duty to inquire of you whether you fully appreciate what you are doing when you waive a jury trial. It is your right to waive the jury trial, but it is my duty to ask you if you fully appreciate what you are doing when you waive a trial by jury. Whether you know it or not, I will tell you, that under the constitution of the United States and the State

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[2] The transcript of such hearing is set forth in full in Appendix "B", *infra*, pp. 23-29.

of New York, you are entitled to a trial by jury. Now, if you waive that right which you have by statute, provided I am satisfied that you know what you are doing when you waive the trial, a jury trial, this is what will happen. There will be no jury sitting in this box. The decision, not only on the law, but also on the facts will be made by the judge who sits here. Probably myself, but it doesn't matter. If you waive a jury, you waive a jury for all purposes, and whatever judge is sitting here will try you without a jury to decide on the facts of the case.

Now this means you are putting your faith on the facts as well as the law in the hands of the judge who sits here. Do you fully understand that?

The Defendant: Yes, I do.

The Court: And do you still wish to waive a trial by jury?

* * *

The Defendant: Yes."

The court then proceeded to continue to interrogate the defendant as to the charges under the indictments [Appendix "B", *infra*, p. 26]

> "The Court: * * * Now with full realization of the facts, do you still want to waive a jury trial and submit your fate to one man, the man who sits in this chair? Is that what you want to do, Mr. Herring?
>
> The Defendant: Yes, your Honor."

The defendant then signed a "Waiver of Jury Trial", witnessed by his counsel and approved by Justice Barlow, as required by the New York State Constitution Art. 1, § 2 and CPL § 320.10, fully aware that he was waiving an inviolate right guaranteed to him by the United States

Constitution "and with full understanding of the rights [he was] waiv[ing]."[3]

C. The Trial and Verdict

During the trial the the trial justice took "copious notes" of the testimony as attested to by defendant's counsel (App. 66).[4] At the conclusion of the State's case the defendant's counsel moved to dismiss each of the three counts of the indictment.[5] The motion was denied as to the first two counts involving attempted robbery but granted as to the third count involving possession of a "dangerous instrument" (App. 66-68).

At the conclusion of the trial, Justice Barlow permitted the making of motions but advised that he would "not permit summations." The defendant's counsel then renewed his motion to dismiss the two remaining counts for attempted robbery, giving his reasons therefor. Such motion again was denied by Justice Barlow, who then refused to hear the defendant's counsel "on the facts", since as he stated:

> "The Court: Under the new statute, summation is discretionary, and I choose not to hear summations." (App. 92)

The Court then retired to deliberate a verdict and then found the defendant "not guilty" on the more serious

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[3] A copy of such Waiver of Jury Trial signed by the defendant and witnessed by Justice Barlow is reproduced in Appendix "C", *infra*, pp. 30-31.

[4] Numerical references preceded by "App." are to the printed main appendix.

[5] The defendant was charged with Attempted Robbery in the First Degree (Penal Law § 160.15); Attempted Robbery in the Third Degree (Penal Law § 160.05) and Possession of Weapons and Dangerous Instruments and Appliances (Penal Law, § 265.05).

charge of attempted robbery in the first degree and "guilty" of the lesser charge of attempted robbery in the third degree (App. 93).[6]

Summary of Argument

The New York constitutional and statutory scheme, which grants to a criminal defendant an unconditional and unrestricted right, subject to judicial supervision, to waive a jury trial in all non-capital cases, and under which waiver the defendant may knowingly lose the right to sum up to the trial judge prior to the rendition of the verdict does not violate any fundamental federal constitutional right of the defendant.

The United States Constitution guarantees to every defendant charged with a crime the right to trial by jury which right is inviolate (Article 3, Section 2, Clause 3; Sixth Amendment). However, a person charged with a crime punishable by imprisonment may consistently with the United States Constitution waive trial by jury and consent to a trial by the court without a jury (*Patton* v. *United States,* 281 U.S. 276, 1930). The federally protected constitutional right to trial by jury does not give rise to a correlative right to trial without jury. There is no federal constitutional right to trial without a jury in a criminal case, since the ability to waive a constitutional

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[6] The charge of attempted robbery in the first degree (New York Penal Law, § 160.15) of which defendant was acquitted is a class B felony, which if he had been convicted would have subjected him to an indeterminate sentence "not to exceed twenty-five years", whereas the charge of attempted robbery in the third degree (New York Penal Law, § 160.05) of which defendant was convicted is a Class D felony, which subjected him to an indeterminate sentence, "not to exceed seven years" (New York Penal Law, § 70.00[2]). He was sentenced to an indeterminate term not to exceed four years (App. 96) and has been released on parole.

right does not carry with it the right to insist upon the opposite of that right. Moreover, it has long been accepted that the waiver of constitutional rights can be subjected to reasonable procedural regulations (*Singer* v. *United States,* 380 U.S. 24, 1964). In addition thereto a defendant may waive his constitutional right to assistance of counsel and waive a trial by jury against the advice of his lawyer (*Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 1942).

The New York procedure for the waiver of jury trial is designed for the benefit of the defendant which he is entitled to as a matter of right once it is determined that it is tendered in good faith and the defendant understands what he is doing, which is all the Due Process Clause requires (*McCarthy* v. *United States,* 394 U.S. 459, 1969).

A New York defendant contemplating a waiver of trial by jury does so with the explicit knowledge that if he waives a trial by jury he may also be waiving summation by his attorney in the discretion of the trial judge. He may protect his right to summation simply by not waiving his constitutional right to be tried by a jury. However, once he waives his constitutional right to trial by jury, he also waives his right to summation, if the trial judge declines to hear summation, all of which the defendant does knowingly with the assistance of counsel and he is fully aware of the consequences of the choice he is making.

Since there is no federal constitutional right to trial without a jury, and the federal constitutional right to jury trial may be waived, as well as the constitutional right to the assistance of counsel in making such waiver, there is nothing in the Federal Constitution which prohibits the State of New York from providing that inherent in the waiver of jury trial, and forming part of such waiver, is the waiver of the unconditional right to sum up at the

conclusion of the evidence, which may or may not be granted in the discretion of the trial judge.

ARGUMENT

A New York defendant in a criminal non-jury trial has no federally protected constitutional right to sum up to the trial judge prior to the rendition of his verdict, and under the New York scheme the trial judge has discretion to refuse to listen to closing argument without violating any fundamental federal constitutional right of the defendant.

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1257(2) and therefore the only question presented to this Court is whether New York Criminal Procedure Law § 320.20(3)(c) is repugnant to the United States Constitution. In other words, does a New York defendant in a criminal non-jury trial conducted after September 1, 1971, the effective date of the statute, have a federally protected constitutional right to sum up to the trial judge prior to his rendition of the verdict or does the trial judge have discretion to prohibit closing argument, without violating any fundamental federal constitutional right of the defendant. Unless there is such right under the United States Constitution, this Court must as a matter of constitutional law either affirm the state court conviction or dismiss this appeal.

In order to answer this question it is necessary to trace the evolution of criminal non-jury trials in the United States.

The United States Constitution guarantees to every defendant charged with a crime the right to trial by jury which right is inviolate (Article 3, Section 2, Clause 3; Sixth Amendment). Before the decision of this Court, in 1930 in *Patton* v. *United States,* 281 U.S. 276 that the

constitutional right to trial by jury could be waived, the federal courts and those in most of the States required that the trial of a crime be held before a common-law jury of 12 and forbade the waiver of such a jury.[7]

In 1858 the New York Court of Appeals in *Cancemi* v. *The People,* 18 N.Y. 128, 135-138, crystallized the then inflexible rule that a person charged with a crime was not permitted to waive a trial by jury. In that case as in *Patton* v. *United States, supra,* decided by this Court almost 75 years later, in open court and under the guidance and advice of counsel the defendant, on trial charged with murder, consented to the discharge of a juror and the continuation of the trial by 11 jurors. On appeal, following his conviction, the main issue raised the impropriety of the proceedings. In reversing the judgment, the New York Court of Appeals held, in effect, that in the absence of a constitutional provision, even the Legislature could not dispense with a common-law jury. *Cancemi* influenced many other jurisdictions to adopt similar views (see *Patton* v. *United States,* 281 U.S. at 302). Thereafter, the federal government as well as many States permitted waiver of trial by jury in a criminal case. In some States the right so accorded a defendant is absolute and unqualified such as in New York. In others, such as under the Federal Rules of Criminal Procedure, the consent of the prosecutor, the approval of the court, or both are required. Whether treated as a privilege or a right, in some jurisdictions it was accom-

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[7] One of the notable exceptions existed in Maryland, where during the colonial period criminal trials had been conducted by the courts alone on waivers. This procedure was confirmed by a legislative act in 1809 and a constitutional amendment in 1867. For a discussion of the English and early American attitudes toward non-jury trials see *The Historical Development of Waiver of Jury Trials in Criminal Cases* by Erwin N. Griswold, 20 Va. L. Rev., p. 655 (1934); see also *Singer* v. *United States,* 380 U.S. 24, 28-31 (1964); *People* v. *Cosmo,* 205 N.Y. 91, 96-97, 98 N.E. 408 (1912).

plished by means of a constitutional provision or by statute, in some by judicial decision, and in others, as in the Federal system by rules of procedure.[8]

Finally, in 1930 this Court, in discarding the inflexible *Cancemi* rule in respect to the federal system in *Patton* v. *United States,* 281 U.S. 276 held that "a person charged with a crime punishable by imprisonment for a term of years may consistently with the [United States Constitution], waive trial by a jury of twelve persons and consent to a trial by any lesser number, or by the court without a jury" (281 U.S. at 290); that "the framers of the Constitution simply were intent upon preserving trial by jury pri-

[8] *Arkansas:* (1874) Constitutional provision requires statutory implementation. Statute limited to misdemeanors.

California: (1928) Constitutional amendment. Consent of the prosecution and the defendant is mandated. *People* v. *Benjamin,* 140 Cal. App. 2d 703, 295 P. 2d 477 (1956); *People* v. *Eubanks,* 7 Cal. App. 2d 588, 46 P. 2d 789 (1935).

Connecticut: (1921) Statute. Court may not deny waiver.

Georgia: Code. The Court may deny a waiver of trial by jury. *Palmer* v. *State,* 195 Ga. 661, 25 S.E.2d 295 (1943).

Illinois: (1941) Code. Court may not deny waiver. *Illinois* v. *Spegal,* 5 Ill. 2d 211, 125 N.E.2d 468 (1955).

Indiana: (1926) Statute. The Court may deny a demand for a non-jury trial. *Mitchel* v. *State,* 233 Ind. 16, 115 N.E.2d 595 (1953); *Alldredge* v. *Indiana,* 239 Ind. 256, 156 N.E.2d 888 (1959).

Kansas: The Court may reject defendant's waiver of a jury trial. *State* v. *Ricks,* 173 Kan. 660, 250 P.2d 773 (1952).

Maryland: (1867) Constitution. (1924) Statute.

Massachusetts: The Court has a right to reject the waiver filed. *Commonwealth* v. *Millen,* 289 Mass. 441, 194 N.E. 463 (1935); *Commonwealth* v. *Rowe,* 257 Mass. 172, 153 N.E. 537 (1926), 48 A.L.R. 762. See Annotation (Right to waive trial by jury in criminal cases, 48 A.L.R. at 767-778) for earlier rule in various States.

Michigan: (1927) Statute. The Court may disregard a jury waiver in a criminal case. *City of Grand Rapids* v. *Bateman,* 93 Mich. 135, 53 N.W. 6 (1892).

Minnesota: (1857). Constitution provides for a statute. No statute.

(footnote continued on following page)

marily for the protection of the accused" (281 U.S. at 297); and Article III, Section 2, Clause 3, "was meant to confer a right upon the accused which he may forego at his election," (281 U.S. at 298).

However, the federally protected "Constitutional right to trial by jury does not give rise to a correlative right to trial without jury." (*United States* v. *Igoe,* 7th Cir. 1964, 31 F. 2d 766, cert. denied, 380 U.S. 924, rehearing denied, 380 U.S. 989) and "there is no constitutional right to a non-jury trial" (*United States* v. *Bowles,* 2d Cir. 1970, 428 F. 2d 592, cert. denied, 400 U.S. 928) and "[a]n accused has no absolute or exclusive right to elect a trial by the court alone without a jury" (*United States* v. *Clausell,* 2nd

(footnote continued from preceding page)

New Mexico: Before any waiver can become effective, the sanction of the Court must be had. *State* v. *Shroyer,* 49 N.M. 196, 160 P.2d 444 (1945).

North Carolina: (1876) Constitution.

Ohio: (1930) Statute. The Court may refuse to honor a jury waiver. *Ickes* v. *State,* 63 Ohio St. 549, 59 N.E. 233 (1900); *State ex rel. Warner* v. *Baer,* 103 Ohio St. 585, 134 N.E. 786 (1921).

Oklahoma: (1907) Self-executing constitutional provision.

Pennsylvania: No waiver permissible in absence of statute. See *Commonwealth* v. *Hall,* 291 a. 341, 140 Atl. 626 (1928), 58 A.L.R. 1023 and Annotation (Right to waive trial by jury in criminal cases, 58 A.L.R. at 1031-1032).

Virginia: Constitution and Statute. Waiver requires consent of the prosecutor and of the Court. See *Dixon* v. *Commonwealth,* 161 Va. 1098, 172 S.E. 277 (1934); *Boaze* v. *Commonwealth,* 165 Va. 786, 183 S.E. 263 (1936).

Washington: (1929) Statute. Court must approve.

Wisconsin: (1848) Constitution providing for statutory implementation; (1929) Statute.

Alabama, Nebraska, New Hampshire and *Tennessee,* among others, permit jury waivers in certain instances by judicial decision.

United States: Federal Rules of Criminal Procedure, Rule 23(a), which provides:

> "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

Cir. 1968, 389 F. 2d 34). As stated by Chief Justice Burger, when he sat on the Court of Appeals for the District of Columbia in *Dixon* v. *United States,* 1961, 292 F. 2d 768, 769:

> "There is of course an absolute right to trial by jury in every criminal case, but *there is no absolute right to trial by the court without a jury.*" [Emphasis supplied].

This Court held in *Singer* v. *United States,* 380 U.S. 24, 34-35 (1964), that there is no federal constitutional right to trial without a jury in a criminal case[9] since "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."

In *Singer* the defendant contended "that a defendant in a federal criminal case has not only an unconditional constitutional right, guaranteed by Art. III, § 2, and the Sixth Amendment, to a trial by jury, but also a correlative right to have his case decided by a judge alone if he considers such a trial to be to his advantage." He further contended that such right could not be conditioned upon "the approval of the court and the consent of the government" as required by Rule 23(a) of the Federal Rules of Criminal Procedure (380 U.S. at 25-26). In rejecting this contention and holding that there is no such constitutional right to a non-jury trial and "the effectiveness of this

[9] This does not prevent a state such as New York from granting such a right under its State Constitution since "[o]f course, the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake" (*Lego* v. *Twomey,* 404 U.S. 477, 489, 1972). However, such higher standard imposed by the State does not engraft such right into a federally protected constitutional right.

waiver, can be conditioned upon the consent of the prosecuting attorney and the trial judge" this Court held, 380 U.S. at 34, that

> "there is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can, as was held in *Patton,* in some instances waive his right to a trial by jury."

"Moreover," as was pointed out in *Singer,* 380 U.S. at 35 "it has long been accepted that the waiver of constitutional rights can be subjected to reasonable regulations." Thus as this Court held in *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 277-278 (1942) a defendant may "waive his constitutional right to assistance of counsel" and waive a trial by jury against the advice of his lawyer,[10] when the Court stated, 317 U.S. at 269

> "an accused in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently waive his constitutional right to assistance of counsel. There is nothing in the constitution to prevent an accused from choosing to have his fate tried before a judge without a jury, even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer."

The New York constitutional provision for a waiver of a jury trial "is designed for the benefit of the defendant [which] he is entitled to as a matter of right . . . once it appears to the satisfaction of the judge of the court having

[10] Appellant's constitutional argument is based on the right to counsel provision of the Sixth Amendment. However, this, which is his only constitutional argument must fail since he may "waive his constitutional right to assistance of counsel" and waive a trial by jury against the advice of his lawyer.

jurisdiction that, first, the waiver is tendered in good faith and is not a stratagem to procure an otherwise impermissible procedural advantage . . . and second that the defendant is fully aware of the consequences of the choice he is making. The requirement that the judge give his 'approval' to the waiver was intended . . . 'to assure [the defendant] . . . full opportunity to understand what he is doing.'" (*People* v. *Duchin*, 12 N Y 2d 351, 352-353, 239 N.Y.S. 2d 670, 190 N.E. 2d 17, 1963) and "is designed to insure that the defendant's waiver is a knowing and intelligent one." (*People ex rel. Rohrlich* v. *Follette*, 20 N Y 2d 297, 300-301, 282 N.Y.S. 2d 729, 229 N.E. 2d 419, 1967).

As a matter of constitutional requirement "for this waiver [of trial by jury] to be valid under the Due Process Clause, it must be an 'intentional relinquishment or abandonment of a known right or privilege.'" (*McCarthy* v. *United States*, 394 U.S. 459, 466, 1969; *Johnson* v. *Zerbst*, 304 U.S. 458, 465, 1938) and the New York procedure to waive trial by jury so requires and is therefore in full compliance with the Due Process Clause.

Pursuant to New York Criminal Procedure Law, § 320.20 (3)(c), "[t]he court may in its discretion permit the parties to deliver summations" in a criminal non-jury case. Since September 1, 1971, the effective date of the statute a New York defendant contemplating a waiver of trial by jury does so with the explicit knowledge that if he waives trial by jury he may also be waiving summation by his attorney, in the discretion of the trial judge. He may protect his right to summation "[a]t the conclusion of the evidence" simply by not waiving his constitutional right to be tried by a jury (CPL § 260.30[8]; Appendix "A", *infra*, p. 22). However, once he waives his constitutional right to trial by jury, he also waives his right to summation, if the trial judge declines to hear summation, all of which the defendant does knowingly with the assistance of counsel and

he is fully aware of the consequences of the choice he is making.[11]

Since there is no federal constitutional right to trial without a jury, and the federal constitutional right to jury trial may be waived, as well as the constitutional right to the assistance of counsel in making such waiver, there is nothing in the Federal Constitution which prohibits the State of New York from providing that inherent in the waiver of jury trial, and forming part of such waiver, is the waiver of the unconditional right to sum up at the conclusion of the evidence, which may or may not be granted in the discretion of the trial judge.[12]

CONCLUSION

The order of the Appellate Division of the Supreme Court of the State of New York, Second Department should in all respects be affirmed.

Dated: New York, New York, February 14, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Pro Se Pursuant to New York Executive Law § 71

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

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Of Counsel

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[11] The decision in this case may be of very limited national significance since New York is the only State which, by Statute authorizes the trial court in a non-jury trial to dispense with closing argument. (See Brief for Appellant, footnote 13 at page 15).

[12] Whether or not the failure of the trial judge to grant summation in a particular non-jury case is an abuse of discretion is a matter strictly for the state court, and is certainly not of constitutional dimensions.

APPENDIX A

New York Constitutional Provision and Statutes Relating to Non-Jury Trials.

McKinney's Consolidated Laws of New York Annotated

Book 2 (Constitution Article 1 to 2)
Article 1, Section 2 (pp. 55, 56, 204)

§ 2. [Trial by jury; how waived]

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

Amended Nov. 8, 1938, eff. Jan. 1, 1939.

Book 11A Criminal Procedure Law
(CPL Sections 170 to 329)

Article 320—Waiver of Jury Trial and Conduct of Non-jury Trial

Sec.

320.10 Non-jury trial; when authorized (pp. 602, 603).
320.20 Non-jury trial; nature and conduct thereof (pp. 605, 606).

§ 320.10 Non-jury trial; when authorized

1. Except where the indictment charges a crime for which a sentence of death may be imposed upon conviction, the defendant, subject to the provisions of subdivision two, may at any time before trial waive a jury trial and consent to a trial without a jury in the superior court in which the indictment is pending.

2. Such waiver must be in writing and must be signed by the defendant in person in open court in the presence of the court, and with the approval of the court. The court must approve the execution and submission of such waiver unless it determines that it is tendered as a stratagem to procure an otherwise impermissible procedural advantage or that the defendant is not fully aware of the consequences of the choice he is making. If the court disapproves the waiver, it must state upon the record its reasons for such disapproval.

3. An indictment "charges a crime for which a sentence of death may be imposed," within the meaning of subdivision one, when:

(a) It charges the defendant with murder as defined in subdivision one or three of section 125.25 of the penal law; and

(b) There is some possibility that either (i) the victim of the alleged crime was a peace officer who was killed in the course of performing his official duties, or (ii) the defendant was at the time of the commission of the alleged crime confined in a state prison or otherwise in custody under a sentence specified in subparagraph (ii) of paragraph (a) of subdivision one of section 125.30 of the penal law; and

(c) There is some possibility that the defendant was more than eighteen years old at the time of the commission of the alleged crime.

In determining whether there is some possibility of the existence of the factors specified in this subdivision so as to preclude a waiver of a jury trial, the court must, if the allegations of the indictment are not conclusive of the matter, examine the minutes of the grand jury proceeding underlying the indictment and conduct any further inquiry which may be necessary to acquire the information essential to such determination.
L. 1970, c. 996, § 1, eff. Sept. 1, 1971.[13]

Source of section: New.

§ 320.20 Non-jury trial; nature and conduct thereof

1. A non-jury trial of an indictment must be conducted by one judge of the superior court in which the indictment is pending.

2. The court in addition to determining all questions of law, is the execlusive[1] trier of all issues of fact and must render a verdict.

3. The order of the trial must be as follows:

(a) The court may in its discretion permit the parties to deliver opening addresses. If the court grants

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[13] This is the text of § 320.10 as it existed in 1972 when the defendant waived a jury trial and was tried and convicted in the State Court without a jury. Effective September 1, 1974 the Legislature substituted in subdivision 1 "the crime of murder in the first degree" for "a crime for which a sentence of death may be imposed upon conviction" and repealed subdivision 3. The present text of subdivision 1 which is found in the 1974 Pocket Part pp. 123-124, now reads:

§ 320.10 Non-jury trial; when authorized

1. Except where the indictment charges the crime of murder in the first degree, the defendant, subject to the provisions of subdivision two, may at any time before trial waive a jury trial and consent to a trial without a jury in the superior court in which the indictment is pending.

[*3. Repealed*]

As amended L.1974, c. 367, §§ 15, 16.

such permission to one party it must grant it to the other also. If both parties deliver opening addresses, the people's address must be delivered first.

(b) The order in which evidence must or may be offered by the respective parties is the same as that applicable to a jury trial of an indictment as prescribed in subdivisions five, six and seven of section 260.30.

(c) The court may in its discretion permit the parties to deliver summations. If the court grants permission to one party, it must grant it to the other also. If both parties deliver summations, the defendant's summation must be delivered first.

(d) The court must then consider the case and render a verdict.

4. The provisions governing motion practice and general procedure with respect to a jury trial are, wherever appropriate, applicable to a non-jury trial.

5. Before considering a multiple count indictment for the purpose of rendering a verdict thereon, and before the summations if there be any, the court must designate and state upon the record the counts upon which it will render a verdict and the particular defendant or defendants, if there be more than one, with respect to whom it will render a verdict upon any particular count. In determining what counts, offenses and defendants must be considered by it and covered by its verdict, and the form of the verdict in general, the court must be governed, so far as appropriate and practicable, by the provisions of article three hundred governing the court's submission of counts and offenses to a jury upon a jury trial.

L. 1970, c. 996, § 1, eff. Sept. 1, 1971.

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[1] So in original. Probably should be "exclusive."

Source of section: New.

Appendix A.

§ 260.30 Jury trial; in what order to proceed (p. 484)

The order of a jury trial, in general, is as follows:

1. The jury must be selected and sworn.

2. The court must deliver preliminary instructions to the jury.

3. The people must deliver an opening address to the jury.

4. The defendant may deliver an opening address to the jury.

5. The people must offer evidence in support of the indictment.

6. The defendant may offer evidence in his defense.

7. The people may offer evidence in rebuttal of the defense evidence, and the defendant may then offer evidence in rebuttal of the people's rebuttal evidence. The court may in its discretion permit the parties to offer further rebuttal or surrebuttal evidence in this pattern. In the interest of justice, the court may permit either party to offer evidence upon rebuttal which is not technically of a rebuttal nature but more properly a part of the offering party's original case.

8. At the conclusion of the evidence, the defendant may deliver a summation to the jury.

9. The people may then deliver a summation to the jury.

10. The court must then deliver a charge to the jury.

11. The jury must then retire to deliberate and, if possible, render a verdict.

L. 1970, c. 996, § 1, eff. Sept. 1, 1971.

Source of Section

See, Code Crim.Proc. 1881, § 388, amended L.1926, c. 417.

APPENDIX B

Transcript of Court Hearing at Which Defendant Waived Trial by Jury.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF RICHMOND

CRIMINAL TERM PART I

Ind. No. 1/1972
CHARGE: Robbery 3rd deg.

Ind. No. 311/1971
CHARGE: Att. rob. 1st deg.

FOR ALL PURPOSES

PEOPLE OF THE STATE OF NEW YORK,

against

CLIFFORD HERRING,

Defendant.

County Courthouse
Staten Island, N. Y. 10301

Friday, January 28, 1972
3:25 p.m.

BEFORE:

HONORABLE THEODORE G. BARLOW
Justice of the Supreme Court

APPEARANCES:

JOHN M. BRAISTED, JR., Esq., District Attorney
Appearing for the People
By: ARNOLD BERLINER, Esq., ADA, of Counsel

SEYMOURE ADAMS, Esq.
Appearing for the Defendant

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IRWIN GOLDSTEIN,
Official Court Reporter.

The Clerk: Indictment 1/1972, and 311/1971, People against Clifford Herring, by Mr. Adams.

(Defendant stands before the bar with counsel.)

Mr. Adams: Judge, in this particular case, Judge, I spoke to Mr. Berliner here, and it seems that both cases will have to be tried. The defendant is willing to try the cases non-jury, Judge. And as long as there is no confession or admission made, as Mr. Berliner has told me, and nothing was seized, as I have been told, I will be ready to go next week, Judge. The reason I pushed on it, if I use the proper words, Judge, is because the defendant has been in jail several months now, Judge. And with the new rules now, and what you read, I think we should give the defendant a trial.

The Court: The new rules don't apply to anybody arrested prior to May 31, 1972. So the new rules have nothing to do with this. However, if the defendant wants to waive a jury trial, under the new statute he must do so in writing, in open court, in front of the Judge. Does he wish to waive a jury trial now?

Mr. Adams: Yes, Judge. (Confers with defendant.) Yes.

The Court: Now, Mr. Herring, it is my duty to inquire of you whether you fully appreciate what you are doing when you waive a jury trial. It is your right to waive the jury trial, but it is my duty to ask you if you fully appreciate what you are doing when you waive a trial by jury. Whether you know it or not, I will tell you, that under the constitution of the United States and the State of New York, you are entitled to a trial by jury. Now, if you waive that right which you have by statute, provided I am satisfied that you know what you are doing when you waive the trial, a jury trial, this is what will happen. There will be no jury sitting in this box. The

decision, not only on the law, but also on the facts will be made by the judge who sits here. Probably myself, but it doesn't matter. If you waive a jury, you waive a jury for all purposes, and whatever judge is sitting here will try you without a jury to decide on the facts of the case.

Now, this means that you are putting your faith on the facts as well as the law in the hands of the judge who sits here. Do you fully understand that?

The Defendant: Yes, I do.

The Court: And do you still wish to waive a trial by jury?

The Defendant: Pardon me?

The Court: Do you still wish to waive a trial by jury?

The Defendant: Yes.

The Court: Now, do you wish to waive a trial by jury as to both of these indictments, the first indictment—

Mr. Adams: The first one I believe is—

The Court: Well, 311/1971, which charges attempted robbery in the first degree, according to my calendar.

Mr. Adams: Yes.

The Court: And the second indictment is indictment number 1/1972, which charges the defendant with robbery in the third degree.

Mr. Adams: I make an application on behalf of the first one, Judge, at this time.

The Court: Mr. Adams, I am not by-passing you, but it is my duty to interrogate the defendant personally on this.

Mr. Adams: I am sorry, Judge, I didnt' mean to interrupt.

(Mr. Adams confers with defendant.)

The Court: Mr. Herring, under this indictment, 311/1971, you are charged in three counts, the first count charges you with attempted robbery in the first degree: the second count charges you with attempted robbery in the third

degree; and the third count charges you with possession of weapons and dangerous instruments and appliances as a felony. Now, with full realization of the facts, do you still want to waive a jury trial and submit your fate to one man, the man who sits in this chair? Is that what you want to do, Mr. Herring?

The Defendant: Yes, your Honor.

The Court: All right. Have the statement signed.

(Defendant executes waiver.)

The Court: Mr. Herring, is this your signature (showing)?

The Defendant: Yes, it is, your Honor.

The Court: All right, we will mark this case ready and passed. We have one case scheduled for trial on Monday. As soon as that case is completed, we will try this case.

Mr. Adams: All right. Now, Judge, may I state this, Judge? I would appreciate, Judge, Monday and Tuesday I am sort of tied up, Judge. I would be ready on Wednesday, if the Court would be in a position at that time.

The Court: Well, if the case in front of this one is not ready on Monday, this case will start on Monday. What is going to prevent you from trying this case on Monday?

Mr. Adams: Two other commitments.

The Court: Are we talking about trials, or what?

Mr. Adams: Yes, Monday and Tuesday, non-jury cases which will take a very short time.

The Court: The name of the cases?

Mr. Adams: One is Manhattan civil court in New York, which I don't have the file number.

The Court: You are number one on Monday?

Mr. Adams: Yes.

The Court: All right, mark this ready and passed until Wednesday, the 2nd of February. The other case, number

1/1972, we will mark that ready and passed. Might as well select a date on that.

Mr. Adams: Judge, may we have that on for the same date?

The Court: All right, mark it the same date. Obviously we cannot try both the same date. February 2nd.

Mr. Adams: All right. I also have another request, Judge. The defendant informs me that he needs medical care and also needs some dental care.

The Court: Mr. Herring, you didn't get this?

Mr. Adams: No, and he says he is—I think he said he called this—you have called this to the attention of the Court before?

The Defendant: Yes, sir.

Mr. Adams: And he can't eat or swallow, Judge. Perhaps an order of the Court will assist.

The Court: I have already given one, but I will order now medical attention, dental attention, and a report from the department of correction as to when he receives it.

Mr. Adams: Judge, specifically, the medical is for his eyes. He needs glasses.

The Court: Indicate that. I am not sure that is within the realm of the Court, but indicate that on the order. As far as the dental care is concerned, I want a report from the department of correction as to when he receives this dental care. And indicate this is the second order that has been issued.

The Clerk: Remand.

(Defendant is remanded.)

• • •

(At 4:00 p.m. following proceedings take place in presence of defendant.)

The Court: Let the record show Mr. Herring's attorney has left the court, and this has reference only to the dental

treatment that the defendant may need or needs. Mr. Herring, I am told that you have received dental care. Is that correct, have you received dental care?

The Defendant: No, I haven't your Honor.

The Court: You received none?

The Defendant: No, I haven't.

The Court: I was told by the correction—

The Clerk: We were informed by correction that he has received care.

The Court: Do you have any personal knowledge of this?

Correction Officer Mendelsohn: No, your Honor.

The Court: What is exactly the dental care you need?

The Defendant: Your Honor, I have trouble eating, and the food is part of my health.

The Court: What exactly is missing? Is it false teeth?

The Defendant: Yes.

The Court: Did you have false teeth?

The Defendant: I had them, but they were broken and they were to be fixed by the government, and being I am incarcerated, I can't take care of business like that. Because I suffer from severe headaches when I didn't have them the last time.

The Court: Mr. Herring, I don't know what we can do about this under the circumstances. Can you tell me whether any dentist is available?

C. O. Mendelsohn: Yes, they have a dentist up there. As far as false teeth go, I don't think they go that far, unless the man is sentenced for a long time up State.

The Court: Do you have broken false teeth?

The Defendant: Yes.

The Court: Do you know if they have facilities?

C. O. Mendelsohn: Not in the Tombs, sir. I know they take care of the men's teeth in emergencies, any emergency

treatment they need, they pull his teeth, if he needs it. That they do. As to the extent of it, I couldn't say, sir.

The Court: Mr. Herring, I will see if I can figure something out for you. But I don't know what I can do about this. If they don't have the personnel and facilities, I can't require them to do what they can't do.

The Defendant: Your Honor, I understand that with the Court order they will send me out to the hospital, or even Rikers Island and they will take care of me there.

The Court: You think Rikers Island will take care of you?

The Defendant: Yes, glasses.

The Court: Do you have any information on this?

C. O. Mendelsohn: That I couldn't say, sir. But we will inquire.

The Court: I would appreciate that. The man can't eat without false teeth.

The Clerk: Remand.

(Defendant is remanded.)

• • •

Certified to be a true and correct transcript.

IRWIN GOLDSTEIN,
Official Court Reporter.

APPENDIX C

Defendant's Written Waiver of Jury Trial Signed in Open Court During Hearing.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF RICHMOND

CRIMINAL TERM

WAIVER OF JURY TRIAL

IND. NO. 311/1971

THE PEOPLE OF THE STATE OF NEW YORK

against

CLIFFORD HERRING

Defendant

Pursuant to Article 1, Section 2 of the Constitution I, Clifford Herring, the defendant, under Indictment No. 311/1971 do hereby waive a jury trial on this Indictment. I do so after consultation with my counsel, Seymour Adams and with full understanding of the rights which I waive hereby.

s/ CLIFFORD K. HERRING
Defendant

Witnessed by S. ADAMS
Attorney of Record

Appendix C.

Dated: 1/28/72

So ORDERED:

s/ THEODORE G. BARLOW, J.S.C.
HON.
JUSTICE OF THE SUPREME COURT

State of New York }
County of Richmond } ss.:

I, AUGUSTINE B. CASEY, Clerk of the County of Richmond, Do Hereby Certify, that I have compared the foregoing with the original waiver of jury trial on file in this office, and that the same is a correct transcript therefrom and of the whole of such original. Witness my hand and official seal this 7th day of February one thousand nine hundred and seventy-five.

AUGUSTINE B. CASEY
Clerk